

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DOUGLAS CODER & LINDA CODER
FAMILY LLLP.

Case No. 3:19-cv-00520-MMD-CLB

ORDER

Plaintiff,
v.

RNO EXHIBITIONS, LLC, *et al.*,

Defendants.

I. SUMMARY

Plaintiff Douglas Coder and Linda Coder Family LLLP sued Defendants RNO Exhibitions, LLC (“RNO”) and Vincent L. Webb (RNO’s alleged alter ego) after Plaintiff lent some money to RNO, but RNO never repaid Plaintiff. (ECF No. 37 (“FAC”).)¹ Before the Court are Webb’s motion to dismiss all of Plaintiff’s claims against him (ECF No. 42), and RNO’s motion to dismiss all but one of Plaintiff’s claims against it (ECF No. 43).² As further explained below, the Court will grant in part, and deny in part, Defendants’ motions to dismiss. The Court finds Plaintiff sufficiently pleaded Webb is RNO’s alter ego, and that Plaintiff’s breach of contract claims should proceed against both Defendants. And while the Court agrees with Defendants that Plaintiff’s breach of the implied covenant of good

¹Defendants moved to dismiss and for a more definite statement as to Plaintiff's initial complaint. (ECF Nos. 10, 11.) After those motions were fully briefed, Plaintiff filed a motion for leave to file an amended complaint. (ECF No. 29.) Then, after a hearing before U.S. Magistrate Judge Carla L. Baldwin (ECF No. 32), the parties conferred and stipulated to both allow Plaintiff to file an amended complaint, and Defendants to withdraw their motions (ECF No. 35). The Court granted the parties' stipulation. (ECF No. 36.) Plaintiff subsequently filed the FAC (ECF No. 37), which is now the operative complaint in this case.

²Plaintiff filed responses (ECF Nos. 46, 47), and Defendants filed replies (ECF Nos. 52, 53). The parties subsequently stipulated to stay this case pending the Court's resolution of these motions to dismiss (ECF No. 54), and the Court granted their stipulation (ECF No. 55).

1 faith and fair dealing and unjust enrichment claims should be dismissed, the Court also
 2 finds Plaintiff's remaining claims should proceed.

3 **II. BACKGROUND**

4 The following allegations are adapted from the FAC. Defendant Webb sent Plaintiff
 5 a business plan for RNO in 2014 representing RNO would be significantly profitable in
 6 2015. (ECF No. 37 at 2-3.) Without correcting this rosy projection, Webb contacted
 7 Plaintiff again in 2015, seeking a "short term bridge loan that was 80% funded and Over
 8 Secured." (*Id.* at 3 (internal quotation marks omitted).) Based on Webb's representations,
 9 Plaintiff entered into an "agreement entitled a 'Term Sheet,' which consisted of two parts:
 10 a 2 Year Promissory Note, and a Buy/Sell Agreement" (collectively, the "Agreement").
 11 (*Id.*; see also ECF No. 37-1 (Agreement).) Webb signed the Agreement on RNO's behalf,
 12 and held himself out to both be an executive of RNO, and Plaintiff's contact for any
 13 questions. (ECF No. 37 at 3.)

14 RNO was supposed to repay Plaintiff the money Plaintiff lent RNO under the
 15 Agreement, but RNO did not repay all of the money in the timeframe specified in the
 16 Agreement. (*Id.* at 4.) RNO's financial situation was much worse than Webb had
 17 represented to Plaintiff. (*Id.*) If Plaintiff had known RNO's true financial situation, it would
 18 not have entered into the Agreement. (*Id.*) In filing this suit, Plaintiff wants its money back
 19 from RNO and Webb, plus interest, and attorneys' fees and costs. (*Id.* at 5-6.)

20 Plaintiff asserts six claims against Defendants: (1) breach of contract; (2) breach
 21 of the covenant of good faith and fair dealing; (3) unjust enrichment; (4) accounting; (5)
 22 intentional misrepresentation; and (6) alter ego—alleging that Webb is essentially
 23 inseparable from RNO, so should be held equally as liable. (*Id.* at 6-12.)

24 **III. LEGAL STANDARD**

25 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
 26 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must provide
 27 "a short and plain statement of the claim showing that the pleader is entitled to relief."
 28 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While

1 Rule 8 does not require detailed factual allegations, it demands more than “labels and
 2 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v.*
 3 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). “Factual allegations
 4 must be enough to rise above the speculative level.” *Twombly*, 550 U.S. at 555. Thus, to
 5 survive a motion to dismiss, a complaint must contain sufficient factual matter to “state a
 6 claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550
 7 U.S. at 570).

8 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
 9 apply when considering motions to dismiss. First, a district court must accept as true all
 10 well-pleaded factual allegations in the complaint; however, legal conclusions are not
 11 entitled to the assumption of truth. See *id.* at 678. Mere recitals of the elements of a cause
 12 of action, supported only by conclusory statements, do not suffice. See *id.* Second, a
 13 district court must consider whether the factual allegations in the complaint allege a
 14 plausible claim for relief. See *id.* at 679. A claim is facially plausible when the plaintiff’s
 15 complaint alleges facts that allow a court to draw a reasonable inference that the
 16 defendant is liable for the alleged misconduct. See *id.* at 678. Where the complaint does
 17 not permit the Court to infer more than the mere possibility of misconduct, the complaint
 18 has “alleged—but it has not show[n]—that the pleader is entitled to relief.” *Id.* at 679
 19 (alteration in original) (internal quotation marks and citation omitted). That is insufficient.
 20 When the claims in a complaint have not crossed the line from conceivable to plausible,
 21 the complaint must be dismissed. See *Twombly*, 550 U.S. at 570.

22 **IV. DISCUSSION**

23 Defendant Webb moves to dismiss all six of the claims Plaintiff asserts against
 24 him, and Defendant RNO moves to dismiss five of the six claims Plaintiff asserts against
 25 it. (ECF Nos. 42, 43.) The Court thus addresses Defendants’ motions as to each of
 26 Plaintiff’s six asserted claims below. The Court then addresses whether it will grant
 27 Plaintiff leave to amend the claims it agrees with Defendants should be dismissed.

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1 **A. Breach of Contract and Alter Ego**

2 While Webb seeks to dismiss this claim, RNO does not. (ECF Nos. 42 at 2-3, 43.)
 3 Webb argues this claim should be dismissed because Plaintiff failed to identify a contract
 4 Webb (as opposed to RNO) entered into, or actions he took to breach that contract
 5 beyond otherwise alleging RNO is an alter ego of Webb. (ECF No. 42 at 2-3.) Plaintiff
 6 responds it “plausibly alleged claims against Webb as an alter ego of RNO[.]” (ECF No.
 7 47 at 3.) Webb replies that Plaintiff’s breach of contract claim against Webb must fail
 8 because Plaintiff’s alter ego theory also fails. (ECF No. 53 at 2.) The Court thus addresses
 9 the parties’ arguments regarding breach of contract and alter ego together—especially
 10 considering that Plaintiff relies on its alter ego theory to bring its other claims against
 11 Webb as well.

12 Under Nevada law, “[a] person acts as the alter ego of a corporation only if: (a)
 13 [t]he corporation is influenced and governed by the person; (b) [t]here is such unity of
 14 interest and ownership that the corporation and the person are inseparable from each
 15 other; and (c) [a]dherence to the notion of the corporation being an entity separate from
 16 the person would sanction fraud or promote a manifest injustice.” NRS § 78.747. Whether
 17 a person acted as the alter ego of a corporation is a question of law. See *id.* Further, “the
 18 alter ego doctrine applies to LLCs.”³ *Gardner on Behalf of L.G. v. Eighth Judicial Dist.*
 19 *Court in & for Cty. of Clark*, 405 P.3d 651, 655 (Nev. 2017). And “[a]lthough ‘there is no
 20 litmus test for determining when the corporate fiction should be disregarded,’ factors
 21 indicating the existence of an alter ego include: ‘(1) commingling of funds; (2)
 22 undercapitalization; (3) unauthorized diversion of funds; (4) treatment of corporate assets
 23 as the individual’s own; and (5) failure to observe corporate formalities.’” *Beta Soft Sys.,*
 24 *Inc. v. Yosemite Grp., LLC*, Case No. 2:16-cv-01748-GMN-VCF, 2017 WL 3707393, at
 25 *3 (D. Nev. Aug. 25, 2017) (citation omitted).

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28 ³RNO is an LLC. (ECF No. 43 at 1.)

1 The Court agrees with Plaintiff it has sufficiently alleged Webb is RNO's alter ego.
 2 (ECF No. 47 at 3.) Plaintiff alleges Webb "controls and manages the business and
 3 operations of RNO in a manner such that it is indistinguishable from himself[.]" (ECF No.
 4 37 at 2; *see also id.* at 10.) In addition, and contrary to Webb's argument (ECF No. 42 at
 5 7-8), Plaintiff goes on to offer supporting factual allegations. Plaintiff alleges Webb sent
 6 Plaintiff several emails to convince Plaintiff to enter into the Agreement. (ECF No. 37 at
 7 2-3.) Plaintiff further alleges Webb signed the Agreement on RNO's behalf, held himself
 8 out as the sole contact for any questions, and referred to himself as holding various
 9 executive positions at RNO such that Webb is "inseparable" from RNO. (*Id.* at 3.) Webb
 10 also made several allegedly false representations to Plaintiff. (*Id.* at 2-4, 8-10.) In pertinent
 11 part, Plaintiff also alleges RNO was undercapitalized, despite Webb's representations
 12 that RNO "anticipated a profit of \$6,616,133 in 2015 and that the loan [Webb sought from
 13 Plaintiff on RNO's behalf] was 'Over Secured[.]" (*Id.* at 4.) Based on these allegations,
 14 the Court finds Plaintiff has plausibly alleged undercapitalization and treatment of
 15 corporate assets as the individual's own sufficient to withstand Webb's motion to dismiss.⁴
 16 See *Beta Soft*, 2017 WL 3707393, at *3 (denying motion to dismiss alter ego theory where
 17 the plaintiff alleged the defendants were undercapitalized and treated corporate assets
 18 as their own).

19 Moving on to Plaintiff's breach of contract claim, the Court similarly finds Plaintiff's
 20 allegations are sufficient to withstand Webb's motion to dismiss. Plaintiff must show: (1)
 21 the existence of a valid contract; (2) a breach by the defendant; and (3) damage because
 22 of the breach. See *Saini v. Int'l Game Tech.*, 434 F. Supp 2d 913, 919-20 (D. Nev. 2006)
 23

24 ⁴Webb relies on *Paul Steelman, Ltd. v. Omni Realty Partners*, 885 P.2d 549 (Nev.
 25 1994) in arguing the Court should dismiss Webb because he is not RNO's alter ego. (ECF
 26 No. 43 at 8 n.29, n.30.) But *Steelman* is distinguishable from this case, especially at the
 27 motion to dismiss stage. *Steelman* affirms a decision reached after a bench trial, see 885
 28 P.2d at 550, where the "facts of record indicate that [one defendant] was adequately
 capitalized, and that the manner in which [another defendant] was capitalized is not
 uncommon for corporations of its type." *Id.* In denying Webb's motion to dismiss, the Court
 is not finally determining RNO is Webb's alter ego. The Court merely finds Plaintiff's
 allegations sufficient. Moreover, in contrast to *Steelman*, where the defendants were
 adequately capitalized, Plaintiff alleges RNO was undercapitalized. (ECF No. 37 at 4.)

1 (citing *Richardson v. Jones*, 1 Nev. 405, 405 (Nev. 1865)). Plaintiff defines Webb as part
 2 of RNO Exhibitions (ECF No. 37 at 2), explains that Webb signed the Agreement on
 3 RNO's behalf (*id.* at 3), explains how both Webb and RNO allegedly failed to satisfy their
 4 obligations under the Agreement by failing to repay the loan (*id.* at 3-6), and states that
 5 Plaintiff was damaged by their failure to repay the loan (*id.* at 6). These allegations suffice.
 6 See *Beta Soft*, 2017 WL 3707393, at *3 (finding the plaintiff sufficiently stated a breach
 7 of contract claim).

8 That said, Webb's only argument as to why this claim should be dismissed is that
 9 Plaintiff does not identify a contract that he breached. (ECF No. 43 at 2-3.) To reiterate,
 10 Plaintiff responds Webb breached the Agreement because RNO is his alter ego. (ECF
 11 No. 47 at 3.) Because the Court has already found Plaintiff's alter ego allegations are
 12 sufficient, the Court accordingly rejects Webb's argument Plaintiff does not identify a
 13 contract Webb breached. See *Beta Soft*, 2017 WL 3707393, at *3 (rejecting nonparty
 14 argument as to breach of contract claim because that court had already rejected the
 15 defendant's challenge to the plaintiff's alter ego theory). In sum, the Court denies Webb's
 16 motion to dismiss Plaintiff's breach of contract claim against Webb, leaving Plaintiff's
 17 breach of contract claim (ECF No. 37 at 6) standing against both Webb and RNO.

18 **B. Breach of the Covenant of Good Faith and Fair Dealing**

19 Defendants argue the Court should dismiss this claim because Plaintiff bases its
 20 allegations on a breach of the Agreement, which is incongruent with a claim for breach of
 21 the covenant of good faith and fair dealing—requiring literal compliance with a contract
 22 that conflicts with the spirit of that contract. (ECF No. 42 at 3-4, 43 at 2-3.) Plaintiff
 23 counters it has properly alleged a claim for breach of the covenant of good faith and fair
 24 dealing implied by the Agreement because such a claim may be alleged in the alternative.
 25 (ECF Nos. 46 at 2-3, 47 at 1-2 (incorporating arguments made in response to RNO's
 26 motion to dismiss).) While the Court agrees with Plaintiff to a point, the Court finds
 27 Defendants' argument more persuasive because the gist of Plaintiff's FAC is for breach
 28 of contract.

1 To establish a claim for contractual breach of the implied covenant of good faith
 2 and fair dealing, a plaintiff must allege both the existence of a valid contract and a breach
 3 of the implied duty of good faith and fair dealing by performing in a manner that was
 4 unfaithful to the purpose of the contract. See *Perry v. Jordan*, 900 P.2d 335, 338 (Nev.
 5 1995); see also *Hilton Hotels v. Butch Lewis Prods.*, 808 P.2d 919, 923-24 (Nev. 1991).
 6 A plaintiff must also establish that the defendant intentionally breached the intention and
 7 spirit of the agreement. See *Morris v. Bank of America*, 886 P.2d 454, 457 (Nev. 1994)
 8 (citing *Hilton Hotels*, 808 P.2d at 922-23).

9 Plaintiff relies on two cases to support its argument it has adequately pleaded its
 10 breach of the implied covenant claim. (ECF No. 46 at 3 (first citing *Hilton Hotels*, 808 P.2d
 11 at 923, then citing *Ruggieri v. Hartford Ins. Co. of the Midwest*, Case No. 2:13-cv-00071-
 12 GMN, 2013 WL 2896967, at *3 (D. Nev. June 12, 2013)).) While both stand for the general
 13 proposition that breach of the covenant of good faith and fair dealing may be pleaded in
 14 the alternative to breach of contract, neither sufficiently supports Plaintiff's position here.
 15 Plaintiff alleges, "RNO Exhibitions has acted unfaithfully to the purpose of the 2 Year
 16 Promissory Note by failing to comply with the terms and obligations thereunder." (ECF
 17 No. 37 at 7.) That is an allegation of breach, not literal compliance unfaithful to the spirit
 18 of the contract. As Judge Navarro stated in *Ruggieri*, in dismissing a breach of the implied
 19 covenant claim, "allegations that a defendant violated the actual terms of a contract are
 20 incongruent with this cause of action and insufficient to maintain a claim." 2013 WL
 21 2896967, at *3. In addition, and in contrast to Plaintiff's allegations in the FAC (ECF No.
 22 37 at 7), *Hilton Hotels* is a case where the defendants literally complied with the terms of
 23 the operative contract, but not with its spirit—in pressuring a prizefighter to forfeit his
 24 championship title. See 808 P.2d at 922-23. Thus, *Hilton Hotels* does not support
 25 Plaintiff's position. In sum, the Court will grant Defendants' motions to dismiss Plaintiff's
 26 breach of the implied covenant claim (ECF No. 37 at 6-7) as to both RNO and Webb.

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1 **C. Unjust Enrichment**

2 Defendants next argue Plaintiff's unjust enrichment claim is unavailable when, as
 3 here, Plaintiff's claim is for breach of an express, written contract. (ECF Nos. 42 at 4, 43
 4 at 3.) Plaintiff counters it has sufficiently alleged its unjust enrichment claim, which may
 5 be alleged in the alternative to a breach of contract claim. (ECF Nos. 46 at 3-4, 47 at 1-2
 6 (incorporating arguments made in response to RNO's motion to dismiss).) Similar to the
 7 Court's ruling on Plaintiff's breach of the implied covenant claim, while the Court again
 8 agrees with Plaintiff to a point, it finds Defendants' arguments more persuasive.

9 "The phrase 'unjust enrichment' is used in law to characterize the result or effect
 10 of a failure to make restitution of, or for, property or benefits received under such
 11 circumstances as to give rise to a legal or equitable obligation to account therefor."
 12 *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182, 187
 13 (Nev. 1997). "Unjust enrichment occurs when ever [sic] a person has and retains a benefit
 14 which in equity and good conscience belongs to another." *Id.* (quotations and citation
 15 omitted).

16 However, "[a]n action based on a theory of unjust enrichment is not available when
 17 there is an express, written contract, because no agreement can be implied when there
 18 is an express agreement." *Id.* (affirming dismissal of unjust enrichment claims as to
 19 parties to written contracts, but reversing as to parties who had not entered into written
 20 contracts). That is the case here, where the Court has ruled Plaintiff may proceed on its
 21 breach of contract claims (see *supra* Section IV.A), and the gist of its FAC is for breach
 22 of contract (ECF No. 37 at 3-6). The cases Plaintiff relies on do not compel a different
 23 result. (ECF No. 46 at 4 (first citing *Asphalt Products v. All Star Ready Mix*, 898 P.2d 699
 24 (Nev. 1995) (stating the elements of an unjust enrichment claim, and affirming the lower
 25 court's finding that the defendant was unjustly enriched in keeping and using a tractor it
 26 did not, and could not, pay for, but reversing the lower court's calculation of the
 27 reasonable rental rate of the tractor), then citing *Szymborski v. Spring Mountain
 Treatment Ctr.*, 403 P.3d 1280, 1285 (Nev. 2017) (noting the general permissibility of

1 alternative pleading, in passing, in sorting through which of the plaintiff's claims were for
 2 medical malpractice, and which were for ordinary negligence)).) The Court will therefore
 3 grant Defendants' motions to dismiss Plaintiff's unjust enrichment claim (ECF No. 37 at
 4 7) as to both RNO and Webb.

5 **D. Accounting**

6 Defendants argue the Court should dismiss Plaintiff's claim for an accounting
 7 because Plaintiff "does not allege any special relationship between it and RNO that would
 8 give rise to an accounting." (ECF Nos. 42 at 4-5, 43 at 3-4.) Plaintiff responds in pertinent
 9 part that it "enjoys a right to accounting from RNO Exhibitions because without an
 10 accounting, there is no way of knowing the value of its alleged 2.8% ownership interest
 11 in RNO Exhibitions." (ECF Nos. 46 at 6, 47 at 1-2 (incorporating arguments made in
 12 response to RNO's motion to dismiss).) The Court agrees with Plaintiff on this particular
 13 point.

14 Plaintiff alleges Defendants agreed to give Plaintiff a 2.8% ownership interest in
 15 RNO, but never did. (ECF No. 37 at 5.) Without an accounting, Plaintiff would be unable
 16 to determine the value of this ownership interest, if any. Here, all parties rely on *Mobius*
 17 *Connections Grp., Inc. v. TechSkills, LLC*, Case No. 2:10-cv-01678-GMN, 2012 WL
 18 194434 (D. Nev. Jan. 23, 2012). (ECF Nos. 42 at 4 n.9, 43 at 3 n.6, 46 at 5-6.) The Court
 19 both finds *Mobius Connections* instructive, and that it favors Plaintiff's position. In *Mobius*
 20 *Connections*, Judge Navarro granted a party's motion for summary judgment seeking an
 21 accounting because the applicable agreement entitled that party to a percentage of the
 22 other party's revenue. See 2012 WL 194434, at *8-*9. In so holding, Judge Navarro
 23 applied the commonsense principle that "without an accounting, there may be no way by
 24 which such a party entitled to a share in profits could determine whether there were any
 25 profits[.]" *Id.* at *8. That same principle applies here. If the Court rules at this stage Plaintiff
 26 may not obtain an accounting, Plaintiff would never be able to determine the value of its
 27 promised ownership stake in RNO. That would be inequitable, or at least premature. The
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1 Court denies Defendants' motions to dismiss Plaintiff's claim for an accounting (ECF No.
 2 37 at 8).

3 **E. Intentional Misrepresentation**

4 Defendants further argue the Court should dismiss Plaintiff's intentional
 5 misrepresentation claim because they had no duty to disclose, and there can be no
 6 justifiable reliance on Plaintiff's part.⁵ (ECF Nos. 42 at 5-6, 43 at 4-5.) Plaintiff counters it
 7 sufficiently pleaded its intentional misrepresentation claim, as Defendants had a good
 8 faith duty to disclose because they had access to information Plaintiff did not have access
 9 to, and Plaintiff alleges it relied on Defendants intentional, material omissions in entering
 10 into the Agreement. (ECF Nos. 46 at 6-8, 47 at 3-5.) The Court agrees with Plaintiff.

11 Under Nevada law, intentional misrepresentation requires: "[a] false representation
 12 made by the defendant, knowledge or belief on the part of the defendant that the
 13 representation is false—or, that he has not a sufficient basis of information to make it, an
 14 intention to induce the plaintiff to act or to refrain from acting in reliance upon the
 15 misrepresentation, justifiable reliance upon the representation on the part of the plaintiff
 16 in taking action or refraining from it, and damage to the plaintiff, resulting from such
 17 reliance[.]" *Lubbe v. Barba*, 540 P.2d 115, 117 (Nev. 1975).

18 To start, Plaintiff has sufficiently pleaded the elements of intentional
 19 misrepresentation. (ECF Nos. 46 at 6-7 (citing FAC at 8-10).) Defendants otherwise make
 20 two arguments as to this claim, though the Court finds neither argument persuasive.
 21 Defendants first argue Plaintiff cannot establish justifiable reliance in this case, but then
 22 point to a set of facts not included in the FAC, and not supported by any evidence. (ECF
 23 Nos. 42 at 6, 43 at 4.) The Court also notes Defendants did not alternatively style their
 24 motions to dismiss as motions for summary judgment. Generally, a court may not
 25 consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion to dismiss.

26
 27 ⁵Defendants also argue Plaintiff's intentional misrepresentation claim is precluded
 28 by the economic loss doctrine (ECF Nos. 42 at 6-7, 43 at 5-6), but "the economic loss
 doctrine does not preclude litigants from asserting claims of intentional
 misrepresentation." *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 302 P.3d 1148, 1154 n.2 (Nev.
 2013), as corrected (Aug. 14, 2013).

1 See *United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003). There are three
 2 exceptions to this rule,⁶ but Defendants do not argue any of these three exceptions apply,
 3 nor do they appear to apply. The Court therefore may not consider Defendants' proffered
 4 facts purportedly evidencing Plaintiff's lack of justifiable reliance in this case. Without
 5 those facts, Defendants' lack of justifiable reliance argument is unpersuasive, especially
 6 considering Plaintiff alleges, "Plaintiff relied to its detriment upon the representations and
 7 the material omissions of Webb and RNO Exhibitions, and was induced to make the loans
 8 to RNO Exhibitions as a result." (ECF No. 37 at 9.) The Court rejects Defendants' lack of
 9 justifiable reliance argument.

10 Defendants also argue they had no good-faith duty to disclose their true financial
 11 condition as they were encouraging Plaintiff to enter into the Agreement. (ECF Nos. 42
 12 at 5, 43 at 4.) Plaintiff counters Defendants had a good-faith duty both because they
 13 possessed information material to the proposed transaction that Plaintiff did not, and
 14 because Defendants were proposing conveying an ownership interest in RNO to Plaintiff.
 15 (ECF No. 46 at 7.) Defendants do not reply to these arguments. (ECF Nos. 52 at 4-5, 53
 16 at 2.)

17 The Court finds Plaintiff's arguments more persuasive. Indeed, Defendants even
 18 go so far as to argue, "[n]o such pre-contract duty of good faith is pleaded or exists." (ECF
 19 Nos. 42 at 5, 43 at 4.) This sentence is inaccurate because Plaintiff pleads, "Webb and
 20 RNO were bound in good faith to disclose" the true information about RNO's financial
 21 position they allegedly did not disclose. (ECF No. 37 at 8.) And Defendants do not provide
 22 any caselaw to support their proposition that no pre-contract duty of good faith existed
 23 here. In addition, and as noted, Defendants drop this argument from their reply. (ECF
 24 Nos. 52 at 4-5, 53 at 2.) Suffice to say, this argument is unpersuasive. In contrast,

25
 26 ⁶(1) A court may consider documents "properly submitted as part of the complaint" on a motion to dismiss; (2) if "documents are not physically attached to the complaint," incorporation by reference is proper "if the documents' authenticity . . . is not contested" and 'the plaintiff's complaint necessarily relies' on them," *Lee v. Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (quoting *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998); and (3) "a court may take judicial notice of 'matters of public record.'" *Id.* (quoting *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)).

1 Plaintiff's argument that Defendants had a good-faith duty to disclose both because
 2 Defendants were proposing conveying an ownership interest to Plaintiff—and Defendants
 3 possessed material information about RNO's financial condition that Plaintiff did not—is
 4 supported by applicable law. (ECF No. 46 at 7 (first citing *Villalon v. Bowen*, 273 P.2d
 5 409, 415 (Nev. 1954), then citing *Mackintosh v. Jack Matthews & Co.*, 855 P.2d 549, 553
 6 (Nev. 1993)).) In sum, the Court denies Defendants' motions to dismiss Plaintiff's
 7 intentional misrepresentation claim (ECF No. 37 at 8-10).

8 **F. Leave to Amend**

9 Plaintiff requests leave to amend if the Court dismisses any of Plaintiff's claims.
 10 (ECF Nos. 46 at 9-10, 47 at 1-2 (incorporating arguments made in response to RNO's
 11 motion to dismiss).) The Court has determined it will dismiss Plaintiff's claims for breach
 12 of the implied covenant of good faith and fair dealing, and unjust enrichment, as to both
 13 Defendants. (See *supra* Sections. IV.B. & C.) Defendants argue in pertinent part the Court
 14 should not grant Plaintiff leave to amend these two claims because Plaintiff has already
 15 amended once, Plaintiff has not proposed how it could amend these claims, amendment
 16 would otherwise be futile, and nearly a year has elapsed since Defendants filed their
 17 motions to dismiss Plaintiff's initial complaint, so Defendants would be unduly prejudiced
 18 by the delay that would result were the Court to allow Plaintiff to amend a third time. (ECF
 19 Nos. 52 at 6-7, 53 at 2-3.) The Court agrees with Defendants on this point.

20 The Court has discretion to grant leave to amend and should freely do so "when
 21 justice so requires." Fed. R. Civ. P. 15(a); see also *Allen v. City of Beverly Hills*, 911 F.2d
 22 367, 373 (9th Cir. 1990). Nonetheless, the Court may deny leave to amend if it will cause:
 23 (1) undue delay; (2) undue prejudice to the opposing party; (3) the request is made in bad
 24 faith; (4) the party has repeatedly failed to cure deficiencies; or (5) the amendment would
 25 be futile. See *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008).
 26 Facts raised for the first time in a plaintiff's opposition papers should be considered by
 27 the Court in determining whether to grant leave to amend or to dismiss the complaint with
 28

1 or without prejudice. See *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133,
 2 1137-38 (9th Cir. 2001).

3 Justice does not require granting Plaintiff leave to amend its claims for breach of
 4 the implied covenant of good faith and fair dealing and unjust enrichment. This case has
 5 been in the motion to dismiss stage for nearly a year, and Plaintiff has already amended
 6 its complaint. (ECF Nos. 10 (moving to dismiss initial complaint on October 9, 2019), 37
 7 (FAC).) Moreover, Plaintiff does not point to any additional factual allegations it could
 8 plead to save these two claims, and the Court is not aware of any. And as explained
 9 *supra*, the Court is allowing Plaintiff's breach of contract claim to proceed, so these
 10 alternatively-pleaded claims are both unnecessary, and conflict with the remaining breach
 11 of contract claim. Thus, amendment of these two claims appears futile. See *Cross v.*
 12 *Anthony & Sylvan Pools Corp.*, Case No. 2:20-cv-454-JCM-EJY, 2020 WL 4078191, at
 13 *2, *4 (D. Nev. July 20, 2020) (dismissing these same two claims, the unjust enrichment
 14 claim with prejudice, because a contract determined the parties' relationship); see also
 15 *Hill v. Wells Fargo Bank, N.A.*, Case No. 2:18-cv-01350-MMD-BNW, 2019 WL 5395439,
 16 at *6 (D. Nev. Oct. 21, 2019) (dismissing breach of the implied covenant claim with
 17 prejudice where the plaintiff had already amended and amendment would be futile)
 18 (currently on appeal).

19 In sum, the Court dismisses Plaintiff's claims for breach of the implied covenant of
 20 good faith and fair dealing, and unjust enrichment, as to both Defendants, with prejudice.
 21 Defendants' motions to dismiss are otherwise denied.

22 **V. CONCLUSION**

23 The Court notes that the parties made several arguments and cited to several
 24 cases not discussed above. The Court has reviewed these arguments and cases and
 25 determines that they do not warrant discussion as they do not affect the outcome of the
 26 motions before the Court.

27 It is therefore ordered that Defendant Webb's motion to dismiss (ECF No. 42) is
 28 granted in part, and denied in part, as specified herein.

1 It is further ordered that Defendant RNO's motion to dismiss (ECF No. 43) is
2 granted in part, and denied in part, as specified herein.

3 It is further ordered the stay of this case is lifted.

4 It is further ordered the parties must meet and confer after Defendants file their
5 answers, and then file a new proposed scheduling order within ten days after Defendants
6 file their answers.

7 DATED THIS 9th Day of October 2020.

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11 MIRANDA M. DU
12 CHIEF UNITED STATES DISTRICT JUDGE

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